IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
TORKORNOO (MRS.) JSC
HONYENUGA JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

CIVIL MOTION
NO. J7/15/2022

27TH JULY, 2022

THE REPUBLIC

VRS

COURT OF APPEAL, CAPE COAST …….. RESPONDENT

EX PARTE: JAMES GYAKYE QUAYSON …….. APPLICANT/APPLICANT

AND

MICHAEL ANKOMAH-NIMFAH …….. 1ST INTERESTED PARTY/RESPONDENT

THE ELECTORAL COMMISSION …….. 2ND INTERESTED PARTY/RESPONDENT

RULING

MAJORITY OPINION

TORKORNOO (MRS.) JSC :-

Article 130 of the 1992 Constitution provides in sub-clauses (1) and (2):

(1) *Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –*

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

(2) *Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court*

Article 133 (1) of the 1992 Constitution provides:

133 (1) *The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court*

Rule 54 (a) of the Supreme Court Rules 1996 (CI 16).

It reads:

> *"54 Grounds for Review*
> *The court may review a decision made or given by it on the ground of:*
> *(a) exceptional circumstances which have resulted in a miscarriage of justice; or*

Background to the Application

Michael Ankomah Nimfah, the 1st Interested Party in this application before us, commenced a parliamentary petition in the High Court sitting in Cape-Coast against the Applicant herein (hereafter referred to as Applicant). Judgement was entered against the Applicant on 7th December 2020. In his judgment, the High Court Judge, inter alia, declared the Applicant's election as Member of Parliament for Assin North Constituency as null and void and of no legal effect. The Applicant appealed against the High Court judgement. Following the appeal against the High Court judgement, and prior to the filing of his submissions on the grounds of appeal, the Applicant applied to the Court of Appeal to stay proceedings before it and refer to this court an interpretation of **Article 94 (2)(a)** of the 1992 Constitution.

The Court of Appeal dismissed both the application for stay of proceedings and application for reference to the Supreme Court on 13th December 2021. After reviewing the record before it, it opined that '….*this instant application in effect invites us to make a final determination of a substantive ground of appeal when the appeal itself is not ripe for hearing, a situation that would effectively forestall the hearing of the said ground of appeal…..having given serious thought to the submissions urged before us, we find no merits in this application*.'

Applicant thereafter applied to invoke the supervisory jurisdiction of this court over the Court of Appeal and prayed for an order of certiorari to quash the 13th December 2021 decision of the Court of Appeal. He also prayed for this court to refer to itself, questions relating to the interpretation and enforcement of **article 94 (2)(a)** of the Constitution.

By a unanimous decision of the panel that considered the application to invoke the supervisory jurisdiction of this court, the application for certiorari was dismissed on 9th March 2022. It was the decision of this court that the Court of Appeal acted within jurisdiction to determine the application for reference in the manner it found appropriate. By a majority decision of three, the court also refused to order stay of the appeal proceedings for the purpose of referring to this court, a case for interpretation of **article 94 (2)(a)** of the 1992 Constitution.

Two opinions were written in support of the majority position refusing both the application for certiorari and application to refer to this court a case for interpretation of **article 94 (2)(a).**Two opinions were written in support of a minority position to order a reference for interpretation of **article 94 (2)(a)**.The present application is praying this court to review its majority decision of 9th March 2022 refusing to refer to this court a case for interpretation of **article 94 (2)(a)**.

Grounds for application

In the original affidavit and the Statement of Case supporting the application, counsel for applicant urged fourteen grounds in this application for review of the 9th March 2022 decision of this court. He also filed one supplementary and further

affidavit in support of the application annexing documents relating to various aspects of the litigation that has branched into this application that we are dealing with.

In **Ground 1** of the application, counsel for applicant submits that there were fundamental and patent errors in the majority decision, and that the majority acted without jurisdiction in their refusal to refer the interpretation of **article 94 (2) (a**) to the Supreme Court under **article 130**.

In **Grounds 2, 3 and 4,** Counsel for applicant also submits that the errors complained of include a departure from binding decisions of this court contrary to **article 129 (3)** of the Constitution. According to counsel, the court per one of the majority opinions mis-apprehended what constitutes '*the record*' of the lower court which was to be brought into the Supreme Court to be quashed. Further the same opinion included a '*fundamental and patent error*' in expressing that in the proceedings before the Court of Appeal, no leave was sought and granted to the applicant to refer to the high court judgment.

Grounds 5, 6 and 7 of this application urge that this court's agreement with the Court of Appeal that the application for reference of a constitutional question was premature, in view of the fact that the appeal was not ripe for hearing at the Court of Appeal was at variance with **article 130 (2)** of the Constitution.

Counsel for applicant urges that nowhere in **article 130 (2)** is there a requirement set out that in respect of appeals, an appeal has to be ripe for hearing through the presentation of written submissions before a constitutional question can be referred to the Supreme Court for interpretation. Further, the opinion that picking out one ground of appeal that relates to the interpretation of **article 94 (2) (a)** and allowing a resolution of that ground of appeal prior to the filing of written submissions by both parties would amount to overreaching the appeal process, was an opinion that was fundamentally and patently erroneous to the extent that it introduced extraneous considerations into what a court is required to do when an issue for interpretation and enforcement of a constitutional provision arises in a lower court.

In **Ground 8** of this application, counsel for applicant takes issue with the position of one of the majority opinions finding no significance in the refusal of the High Court judge whose decision was on appeal, to refer to the Supreme Court a case for interpretation of **article 94 (2) (a)** as had allegedly been urged to the High Court judge. According to counsel for applicant, the failure to refer this constitutional provision to the Supreme Court was at the core of the application for certiorari that was unanimously dismissed, and so the earlier failure by the High Court to also refer **article 94 (2) (a)** to the Supreme Court for interpretation could not be an insignificant error. This opinion was therefore a fundamental and patent error that had occasioned a miscarriage of justice.

Ground 9 of this application urged that the second opinion of the majority was wrong in evaluating that the context identified by the applicant as the relevant issues for interpretation included unresolved questions of facts.

Further, counsel for applicant urges that this second opinion included a fundamental and patent error in not finding that all the requirements of **Rule 67** of the Supreme Court **Rules C.I. 16** were sufficiently catered for within the records that had been made available to the Court of Appeal in the application sought to be quashed. These records included the High Court judgment and affidavits in support of the application, without the record of appeal as compiled. Counsel for applicant urged that it is not **Rule 67** that provides the needed guidance for reference of a question for interpretation and enforcement of a constitutional provision to the Supreme Court but **article 130 (2)**.

In **Grounds 10 and 11**, counsel for applicant urges that the second majority opinion contained a fundamental error in claiming that the Supreme Court did not have before it differing interpretations of **article 94 (2) (a)** and a background case properly stated to enable it refer a proper question for interpretation and enforcement of **article 94 (2) (a)**. According to counsel for applicant, the High Court judgment included extensive consideration of the perspectives of the parties emanating from their pleadings and this allowed for the Supreme Court to appreciate the differing interpretations from the parties before it. Further it was not the duty of the parties to present concrete positions on differing interpretations to

be placed on a constitutional provision. The duty for formulating a proper question for interpretation and enforcement lay with the court.

In **Ground 12**, counsel for applicant urges that the court was in fundamental error in failing to appreciate that an expeditious disposal of the question of interpretation of **article 94 (2)(a)** which arose before the trial court necessitated a grant of the application for reference.

The submissions made in support of **Ground 13** urged that the evaluation of the majority opinions that a Writ numbered J1/11/2022 filed by the 1st interested person and exhibited with the application offered an opportunity for the court to receive the full statements of the cases of the parties on **article 94 (2) (a),** constituted a fundamental and patent error made outside of the jurisdiction of the court.

Ground 14 urges that Writ numbered J1/11/2022 filed by the 1st interested person herein was filed in bad faith and constituted forum shopping because it was filed after the application for certiorari that was dismissed on 9th March 2022 was filed in this court.

According to counsel for applicant herein, it would be a flagrant miscarriage of justice for the 1st Interested Party herein to be allowed to engage in forum shopping and this constituted exceptional circumstances which should attract the review of our 9th March 2022 ruling.

Consideration

The Exercise of Discretion in the face of an application to refer a question to Supreme Court under Article 130 (2)

The inference from the recurring position of the applicant from virtually all the grounds of this application is that on the indication that a party requires a constitutional question to be referred to the Supreme Court, that indication takes away the duty of a court to exercise discretion to grant or dismiss the application before the court. According to him, **article 130 (2)** requires the court to refer the relevant question to this court for interpretation and enforcement. A dismissal of such an application takes a court out of jurisdiction and constitutes an exceptional

circumstance to warrant the current review refusing to quash the Court of Appeal decision of 13th December 2022.

Further, the indication that a party's case requires interpretation of a particular constitutional provision takes precedence over the procedural context of the case at the time of the application, such that the court cannot exercise its discretion to determine that the application is premature. This is because **article 130 (2)** takes precedence over any rules of court.

We are firm in our opinion that this is not only an erroneous position that is not supported by the proper interpretation of **article 130 (2),** nor any jurisprudence, but a fallacious position that fails to appreciate that the many laws within our constitutional dispensation are structured to integrate into the requirements of the constitution and provide the pipelines and conduits through which the expressed objectives of the Constitution are achieved.

The Constitution of this country recognises the multiplicity of law, and harmonizes the vast body of law we have by setting out the priority of laws in **article 11**. It is only when a law, enactment or anything contained in or done under the authority of that enactment or act or omission of any person is inconsistent with, or is in contravention of a provision of the constitution, that such law, enactment or act falls out of legality and must be struck down through certiorari, or brought into harmony through other orders provided for by law. But to the extent that lawmakers have laid out statutory and regulatory processes for arriving at any lawful objective, including a constitutional objective, the duty of administrators of justice is to utilize those statutory processes for achieving the goals of law within our constitutional objective. To refuse to do so subverts the purposes of justice delivery mechanisms.

Thus when the Constitution provides for any position or activity as found under **article 130 (2)**, that constitutional direction must be executed within the due process mechanisms provided in other sources of law authorised by the same Constitution.

The structure for administration of justice as meticulously set out under Chapter 11 of the Constitution requires that any matter resolved by the courts is done under

carefully regulated processes that allow a level playing field for every litigant. This level playing field is the field of rules that prevent courts from capriciously circumventing the rules of natural justice, and other substantive legislation. And it is the duty of the courts to ensure that this purpose for achieving legality in all proceedings is achieved.

Thus it cannot be gainsaid that the very same Constitution from which **article 130** emanates also anticipates that originating proceedings under **article 130 (1)**or references to the Supreme Court under **article 130 (2)** would be done within the context of properly regulated proceedings in this court. To this end, the Supreme Court Rules, 1996 CI 16set out the orderly forms and jurisdictional arrangements for carrying out the requirements of **article 130(1)** and **article 130 (2),** and indeed every type of jurisdiction that this court is entrusted with.

That jurisdiction must be properly invoked for decisions flowing from the exercise of the jurisdiction to be valid. When a party initiates proceedings pursuant to **article 130 (1)**, the jurisdiction of this court is invoked in proceedings regulated by **Rules 45 to 53** of **CI 16**. When an issue arises in a court other than the Supreme Court, the reference to this court ought to be done in accordance with **Rule 67 of CI 16**. And the provision of **Rule 67,** especially **sub-rule 67 (2)(g)**are instructive. For the sake of context and coherence, I will set out all of Rule 67 and highlight some parts including **Rule 67 (2)(g)**for emphasis on the point that must be made. It provides:

67. References to the Court

(*1) A reference to the Court for the determination of any question, cause or matter pursuant to any provision of the Constitution or of any other law* ***shall be by way of a case*** *stated by the court below, or by the person or authority making the reference.*

(2) A case stated under sub-rule (1) of this rule ***shall contain-***

(a) a summary of the action or matter before the court below or the person or the authority from which the reference is made;.

(b) the issue involved in the matter before the court or that person or authority;

(c) the matter or question referred for determination by the Court;

(d) any findings of fact relevant to the matter or question referred to the Court;

(e) the arguments of counsel, if any;

(f) the ruling or decision of the court below or of that person

or authority; and

(g) ***a statement by the court below that the determination of the constitutional matter or question*** ***<u>is necessary to a decision</u>*** *of the action, where the reference is made under clause(2) of article 130 of the Constitution*

(3) Each party may, with the consent of the court below or that person or authority, and shall, when so ordered by tile Court, state his case or jointly state a case containing arguments of law and a list of the of decided cases and the statute law in support of the case. .

(4) The Court may call for the record of the proceedings before the court below or before the person or authority making the reference.

(5) The provisions of rule 53 of these Rules shall, with such modification as may be necessary apply to a reference before the Court.

A pertinent question to ask in the face of these comprehensive rules is how a lower court is to make the statement directed by **Rule 67 (2) (g)** to the Supreme Court that the determination of a constitutional matter is necessary to a decision of the action before the court, if it is not allowed to exercise discretion on the issue of necessity? And how the court can exercise discretion on the issue of necessity if it does not have the full record of appeal before it? How does the court

independently, as required by **article 125 (1),** verify facts stated in affidavits in the application before it, if the court does not have the enabling records of the facts of the case to verify from? If the mere application that a question has arisen regarding a constitutional provision requires a court to immediately refer that matter to the Supreme Court without any consideration of the processes before the court and the stage of proceedings?

Underlying all the protests of Applicant against the ruling of the Court of Appeal that we are being asked to review our decision on, is the fact that the Court of Appeal exercised discretion to refuse the application to stay proceedings and refer questions regarding **article 94 (2) (a)** to this court at a particular stage of the appeal before it.

It was in the exercise of its discretion regarding the particular application before it, that the court of appeal determined that because the issue had been raised as ground (e) of the appeal the court had to deal with, '*this ground has to be argued before the court of appeal for it to make a decision on it*'. Our understanding of the ruling is that the Court of Appeal did not refuse to refer this question to this court, nor did it determine that it was well able to interpret any constitutional question. The Court decided that the manner in which it could appropriately hear parties on the ground (e) on the Notice of Appeal that had raised questions regarding **article 94 (2) (a)** was to first hear the parties on the ground of appeal.

It is our view that contrary to the urgings of counsel for Applicant, **article 130 (1)** does not invite a wall against the exercise of a court's discretion in the administration of the jurisdiction it confers on courts. It provides for the context of the administration of that jurisdiction in the highlighted words:

(2) *Where an issue that relates to a matter or question referred to in clause (1) of this article* ***arises in any proceedings in a court*** *other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court*

If the Court of Appeal was not hearing the appeal that had been brought to the court, then what were the proceedings that the Applicant claimed a question had arisen in? The filing of a Notice of Appeal? Was the Court of Appeal hearing or ready to hear the grounds of appeal at the time the application was made? The answer is no. The answer is no because the Court of Appeal Rules 1997 **CI 19** is structured to ensure that if an appellant does not comply with the filing of their written submissions, (and it is the written submissions that inform the court of the several positions of the parties), the jurisdiction of the court to hear any part of the appeal is not even be invoked. The registrar of the court is obligated to certify to the court that the appellant has not filed his written submissions, and the appeal itself may then be struck out without hearing, unless a party satisfies the court on why the appeal should not be struck out.

Rule 20 of CI 19 as amended by **CI 25 of 1999** reads:

20 (1) *An appellant **shall within 21 days** of being notified in Form 6 set out in Part 1 of the Schedule that the record is ready, **or within such timeas the Court may upon terms direct**, file with the Registrar a written submission of his case based on the grounds of appeal set out in the notice of appeal and such other grounds of appeal as he may file* (emphasis mine)

2) *Where the appellant does not file the statement of his case in accordance with sub rule (1), **the Registrar shall certify** the failure to the Court by a certificate as in Form 11A in Part 1 of the Schedule and the Court may upon that order the appeal to be struck out*

Thus the obligation for an appellant to file written submissions is mandatory and time bound, unless leave is sought and granted for the waiver of the time constraint placed on it by the court. From this, we appreciate that when the court determined that the application before it could not constitute appropriate proceedings from which it would discharge any obligation to refer any question for constitutional interpretation, the court was exercising its discretion to deal with the application, and was not out of jurisdiction.

We are satisfied that counsel for Applicant misconceives the functions of the Rules of Court and duties of a court in the administration of justice when he submits that nowhere in **article 130 (2)** is there a requirement set out that in respect of appeals, an appeal has to be ripe for hearing through the presentation of written submissions before a constitutional question can be referred to the Supreme Court for interpretation.

That requirement does not need to be spelt out in **article 130 (2).** It is embedded in the same Constitution that directs in **articles 2 and 11** that all the different sources of law of Ghana must be operated in a hierarchy with constitutional provisions sitting at their apex and providing the integrating benchmark of legality.

As such, unless an enactment or common law principle is in contravention of, or inconsistent with, a provision of the Constitution, that enactment must be read and applied as complementary to the relevant Constitutional provision relating to the enactment. When the operation of law in our jurisdiction is properly understood this way, it is easy to appreciate that **article 130 (2)** anticipates that for its directions to be activated, there will be properly regulated proceedings before a court in which the court has to decide on a question or matter relating to the interpretation of a constitutional provision, before the court's duty to refer that question or matter to this court under **article 130 (2)** can arise.

Counsel for Applicant referred this court to the decisions of the court in **Republic v High Court (Fast Track Division) Accra; ex parte Electoral Commission (Mettle-Nunoo & Others Interested Parties) [2005-2006] SCGLR 514 at 559**; **Nii Kpobi Tettey Tsuru 1 v Attorney – General Suit No J6/01/2009** dated 19th May 2010, **Republic v High Court (Commercial Division) Accra; ex parte Balkan Energy Ghana Ltd & Ors Interested Parties) 2011 2 SCGLR 1183;** , **Republic v High Court (Fast Track Division) Accra; ex parte Zanetor Rawlings 2015 – 2016 1 SCGLR 53**. He submitted that in all these cases, this court expressed that the lower courts acted wrongly in not promptly referring the relevant questions for interpretation of constitutional provisions to the Supreme Court.

We have taken note of the circumstances of these cases and see how they are easily distinguishable from the case before us in the context of when the court below refused to refer the constitutional question. In **Ex parte Electoral Commission (Mettle-Nunoo & Others Interested Parties) cited supra,** both parties had filed pleadings before the court, presented submissions on the relevant constitutional provision to the High Court and settled issues in an application for directions. It was at the hearing of the application for directions that the trial judge refused to refer for interpretation the relevant constitutional provision that both parties had identified as an issue for resolution in the dispute.

Again **in Republic v High Court (Fast Track Division) Accra; ex parte Zanetor Rawlings 2015 – 2016 1 SCGLR 53,** the parties were before the High Court in proceedings that had led to the court making certain decisions. It was on application to quash those decisions in the existing proceedings before the trial high court that this court determined that a question for interpretation of article 94 (1) (a) of the 1992 Constitution had arisen.

In **Republic v High Court (Commercial Division) Accra; ex parte Balkan Energy Ghana Ltd & Ors Interested Parties),** cited supra, it is not clear from the ruling of the court, the stage of proceedings before the High Court that an application was made to the High Court for a reference of the scope of **article 185 (1)** of the Constitution. But what is clear is that at the High Court, both parties had had the opportunity to present their appreciation of the applicable law on the scope of **article 185 (1),** and the High Court had had the opportunity to analyse the law on reference as it related to the peculiar facts of the case before him, before an application was made to the Supreme Court.

In the present case, the effect of the early application by the applicant when he had not filed any submissions based on his notice of appeal, to enable the other parties also file whatever positions they may have on the grounds of appeal, was a situation that would have compelled the Court of Appeal to ignore the requirements of **Rules 20 to 24** of CI 16 regarding the jurisdiction of the Court of Appeal to consider appeals and matters raised therein.

It is our firm opinion that the court below was entitled to exercise discretion to grant or refuse the application for reference in view of the duties imposed upon it by **Rules 20 to 24** and **Rule 67 of CI 19**. That exercise of discretion was a duty the court was compelled to exercise in accordance with the rules that regulate proceedings before the Court of Appeal as a court, and the majority opinions of this court in the decision under the review concerning the Court of Appeal's liberty to decide as it did, at the time it did, is totally supported by law.

Grounds of appeal seeking interpretation of more than one constitutional provision

Counsel for applicant has submitted that, the opinion that picking out one ground of appeal that relates to the interpretation of **article 94 (2) (a),** and seeking a resolution of that ground of appeal prior to the filing of written submissions by both parties would amount to overreaching the appeal process, is an opinion that was fundamentally and patently erroneous to the extent that it introduced extraneous considerations into what a court is required to do when an issue for interpretation and enforcement of a constitutional provision arises in a lower court. We cannot agree with him. This is because a simple reading of the notice of appeal reveals that the appeal covered other significant matters that needed to be considered in any application for an early reference of only **article 94 (2) (a)** to the Supreme Court for interpretation. The notice of appeal contains twelve different grounds of appeal. Within the twelve grounds of appeal is a demand or the interpretation and enforcement of other fundamental statutory and constitutional questions, apart from **article 94 (a)**.

Ground (a) disagrees with the decision of the High Court as being per incuriam **section (1)2** of the **Evidence Act, 1975**. Ground (b) disagrees with the High Court's decision as being per incuriam **article 129 (3)** of the 1992 Constitution. Ground (c) disagrees with the High Court decision as breaching **section 20 (1) (d)** of the **Representation of People Act 1992, PNDC Law 284**. Ground (d) disagrees with the High Court decision as erroneous on account of the Judge determining the case without a trial.

Ground (e) disagreed with the High Court judgement as having been given without jurisdiction, because of a failure to refer **article 94(2) (a)** to the Supreme Court for interpretation. Ground (f) disagrees with the judgment as being erroneous in law and having been given out of jurisdiction. Ground (g) disagrees with the judgment for failing to distinguish between owing allegiance to another country and dual citizenship.

Ground (h) disagreed with the judgment as erroneous and given without jurisdiction by failing to refer article 46 to the Supreme Court for interpretation (emphasis mine). Ground (i) disagrees with the judgment for failing to appreciate the constitutional independence of the Electoral Commission **under article 46**. Ground (j) disagreed with the decision for holding that the procedure of election petition was appropriate for one of the holdings of the court. Ground (k) disagreed with the High Court judgment for lacking any constitutional and/or legal basis. Ground (l) disagreed with the judgment as being wholly against the weight of evidence.

Applicant gave notice that further grounds may be filed upon receipt of the record of proceedings from the High Court.

Now it is clear on the very face of this collection of grounds of appeal pointing to different constitutional and statutory provisions that there was more than one ground of appeal premised on a need to refer a constitutional provision to the Supreme Court for interpretation.

Again, the appeal called for a much more primary question than even the interpretation and enforcement of constitutional provisions – which is whether the proceedings in the High Court were in breach of the audi alteram partem rule of natural justice. In such a situation, how can the Court of Appeal's decision not to refer **article 94 (2) (a)** to this court for interpretation - take it out of jurisdiction or be in violation of the court's duty under **article 130 (2)**? Not only is it trite law that statutes and the Constitution are to be construed as a whole, but documents – such as the notice of appeal that the Court of Appeal had regard to in its decision before us – are to be read as a whole.

We are quite satisfied that on the very face of the notice of appeal – regardless of whatever group of documents counsel for applicant submits were the records before the Court of Appeal – the Court of Appeal was not out of jurisdiction in exercising its discretion regarding the application submitted to it.

Neither did the original panel of this court also consider extraneous matters when it determined that from the records available, that the Court of Appeal was not out of jurisdiction in choosing to exercise discretion against referring **article 94 (2) (a)** to the Supreme Court for interpretation at the time the application was made. The point must be reiterated that in exercising discretion to determine the application before it in one way or the other and on the strength of the documents before it, the Court of Appeal was discharging the very duty it was bound to discharge as a court, and this is why every member of the original panel that decided the matter under review, was satisfied that the application for certiorari was without merit.

We also note that the submissions made in support of **Ground 13** of this application urge that the evaluation in the majority opinions that a Writ numbered J1/11/2022 filed by the 1st interested person and exhibited with the application offered an opportunity for this court to receive the full statements of the cases of the parties on **article 94 (2) (a),** constituted a fundamental and patent error made outside of the jurisdiction of the court. Our view is that to the extent that the parties exhibited the said writ numbered J1/11/2022 in the application before the original panel, the court was within its remit to identify any inferences that may be made from an exhibit within the records of the application.

Grounds for review

Before concluding, we must speak to the decisions regarding an application to review a decision of this court. The directions of these decisions have provided the foundational reasoning upon which the above evaluations have been built. This court has spoken itself hoarse, as expressed **in Mechanical Lloyd v Nartey [1987-1988] 2 GLR 598,** on the need to appreciate that its review jurisdiction is not to be invoked just because a party is unhappy with the outcome of the court's decisions. The Supreme Court does not sit on appeal over its own decisions, in proceedings

disguised as applications in its review jurisdiction. Its decisions are final, and for the review jurisdiction of the court to be sustained, there must be extremely critical reasons.

The review jurisdiction of this court under **article 133** is a special one meant to be exercised only when a decision was made under exceptional circumstances, and those exceptional circumstances have led to a miscarriage of justice.

From the decisions in **Fosuhene v Pomaa [1987 – 88] 2 GLR 105, Nasali v Addy 1987 – 88 2 GLR 286 Afranie v Quarcoo 1992 2 GLR 561** In **GIHOC Refrigeration & Household Products (No 1) v Hanna Assi (No 1) 2007 – 2008 1 SCGLR** 16, any review of this court's decisions have to be founded on '**compelling reasons**' and the presence of reasons that are '**extremely necessary to avoid irremediable harm'** to the party seeking a review of the court's decision. These compelling reasons include a failure to apply '**binding** and **relevant decisions'** and the failure to apply a legal '**principle upon which the decision of a case depended**'.

Again, the jurisprudence on this court's review jurisdiction establishes that '*the exceptional circumstances'* provided for under **rule 54 (a)** of **CI 16** can arise only if the decision of the court was grounded on a fundamental error such as lack of jurisdiction, and failure to misconstrue the primary law or the legal regime on which the decision depended. See also the decision of this court dated 29th July 2014, in **Martin Alamisi Amidu v Attorney General, Waterville Holdings (BVI) Ltd Woyome**, Civil Motion No. J7/10/2013.We do not at all find any such reasons in the decision we have been asked to review.

This court had jurisdiction to rule regarding the application brought to it; and no compelling reasons that point to miscarriage of justice through irremediable harm have been shown to us in this current application.

We have read the submissions of counsel for the 1st interested Party on why this application should be dismissed and see that they have strong merit. However, we are satisfied that the reasons set out above operate as the more cogent reasons to ground our decision.

The application for review of the decision of this court dated 9th March 2022 refusing to quash the decision of the Court of Appeal, Cape-Coast, dated 13th December 2021, is dismissed.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG, JSC:-

My Lords, before us is an application for a review of the 3-2 decision of the ordinary bench of the court delivered on 9th March, 2022. The application was filed pursuant to article 133(1) of the Constitution, 1992 which confers jurisdiction on the Supreme Court to review any decision made or given by us. The grounds on which the Supreme Court may review its decision are stated in Rule 54 of the **Supreme Court Rules, 1996 (C.I.16).** There are only two grounds which are, where a new matter has been discovered after the decision was given or where there are special circumstances that have resulted in a miscarriage of justice. The instant application

is premised on the ground that there are special circumstances that have resulted in a miscarriage of justice. The matters that may arise from a decision of the ordinary bench of the Supreme Court that would qualify as special circumstances so as to warrant the exercise of the court's review jurisdiction have been considered by the court in several cases. In **Afranie II v Quarcoo and Others [1992] 2 GLR 561** at p. 605 to 606 Aikins, JSC catalogued some of the special circumstances stated in earlier decisions of the Supreme Court. He said as follows;

"Exactly what constitute exceptional circumstances are not spelt out, but various decisions of this court contain diverse opinions on what may be regarded as constituting exceptional circumstances. For example:

(a) The circumstances should be of such a nature as to convince this court that the judgment should be reversed in the interest of justice, and should indicate clearly that there had been a miscarriage of justice: see Bisi v. Kwayie [1987-88] 2 G.L.R. 295, S.C.

(b) The jurisdiction is exercisable in exceptional circumstances where demands of justice make the exercise extremely necessary to avoid irremediable harm to an applicant: see Nasali v. Addy [1987-88] 2 G.L.R. 286, S.C.

(c) Where a fundamental and basic error might have inadvertently been committed by the court resulting in a grave miscarriage of justice: see Mechanical Lloyd Assembly Plant Ltd. v. Nartey [1987-88] 2 G.L.R. 598, S.C.

(d) Decision was given per incuriam for failure to consider a statute or case law or a fundamental principle of practice and procedure relevant to the decision and which would have resulted in a different decision: see Mechanical Lloyd Assembly Plant Ltd. v. Nartey (supra) and Ababio v. Mensah (No. 2) [1989-90] 1 G.L.R. 573, S.C.

(e) When the appellant had sought for a specific relief which materially affected the appeal and had argued grounds in support, but the appellate court failed or neglected to make a decision on it: see Mechanical Lloyd Assembly Plant Ltd. v. Nartey (supra)."

Though the situations stated above are not exhaustive, subsequent cases in which the court reviewed decisions of its ordinary bench fall broadly within the parameters noted by Aikins, JSC above.

The applicant in the application at bar submits that the decision of the majority of the ordinary bench contains basic and fundamental errors of law and was *per incuriam* constitutional and statutory provisions and precedents binding on the court so there are special circumstances that justify a review of their decision. Those are undoubtedly approved instances for the exercise of the review jurisdiction of the court so what is required of us the review bench is to consider whether these submissions have been substantiated. The decision sought to be reviewed was of an application by the applicant that had prayed the ordinary bench for two orders, namely;

i) an order of certiorari to quash a ruling by the Court of Appeal in which the Court of Appeal refused to stay its proceedings in an election petition involving the applicant and also declined to determine whether or not to make a referral of article 94(2)(a) of the Constitution, 1992 to the Supreme Court for interpretation pursuant to article 130(2); and

ii) an order by the Supreme Court staying proceedings in the election petition pending in the Court of Appeal and referring to itself the said article 94(2)(a) of the Constitution for interpretation.

The majority of the ordinary bench refused to grant both orders prayed for and it is particularly their reasoning in refusing to stay the proceedings in the Court of Appeal and to make the referral to the court by itself for the constitutional provision to be interpreted that is being attacked in this review application. There were two opinions by Kulendi and Torkornoo, JJSC for the majority, assigning different reasons for their refusal of the entire application and the applicant, understandably, has had to address the different reasons which is the only way that he can justify his submissions alleging fundamental and basic errors that failed to follow binding statutory provisions and judicial precedents.

In his opinion, our honourable brother Kulendi, JSC summarised his reasons for refusing the entire application in the following concluding words;

"In conclusion, having carefully read and considered all the processes filed in this suit as well as submissions made by counsel for both the Applicant and the 1st Interested Party herein, it is our considered opinion that on the totality of the circumstances of this case, the Applicant has failed to demonstrate to this Court that the Court of Appeal in its ruling dated 13th December, 2021 committed any fundamental errors patent on the face of the record to warrant the exercise of our supervisory jurisdiction. The application is therefore unmeritorious and accordingly fails in its entirety."

However, these reasons only explained why our brother decided not to quash the ruling of the Court of Appeal by order of certiorari but they did not, with great respect, explain why he decided not to stay proceedings in the Court of Appeal and to make a referral of article 94(2)(a) of the Constitution to the Supreme Court for it to be interpreted. To find his reasoning for dismissing the second prayer of the applicant, one has to consider the following paragraph in his ruling;

"In any event, in our preliminary comment, we have alluded to the pendency of a Suit No. J1/11/2022 between the same parties wherein an interpretation of article 94(2)(a) is sought among other reliefs. Having regard to (sic) terms of Rule 67 of the Supreme Court Civil Procedure Rules, C.I 16 which regulates the exercise of our jurisdiction in respect of references to this Court, we are of the considered opinion that this writ presents *a more convenient and procedurally proper context for the adjudication of the issues that are entailed in the reference sought in this application.* We see no reasonable exercise of our discretion under article 132 to make a referral unto ourselves in respect of a matter that is already the subject matter of a writ invoking our exclusive original jurisdiction under article 130 and between the same parties. Consequently, we are of the opinion that the issues in controversy in this application are already before this Court in *a more appropriate form and it is therefore unnecessary, if not an abuse of process and time, to exercise our*

discretion and refer unto ourselves **the very same issues that are the subject matter of Suit No. J1/11/2022 aforesaid, as prayed by the Applicant."**(Emphasis supplied).

But, unlike the consideration of the applicant's prayer for certiorari where our learned brother in his opinion under reference reviewed and discussed the authorities cited by the lawyers in their statements of case, he did not discuss the factors stated in the several decided cases cited by the parties as factors that the Supreme Court in previous cases said ought to determine whether it shall make a referral to itself or not. But in my understanding, and as was pointed out by Dordzie, JSC in her dissenting opinion in the judgment of the ordinary bench, it was the refusal to stay the proceedings in the election petition pending in the Court of Appeal and to make the referral of the constitutional provision to the Supreme Court that was the crux of the original application.

To begin a consideration of the arguments made by the applicant in support of his submission that the above reasoning of Kulendi, JSC contained basic and fundamental errors and failed to follow binding precedents, it ought to be noted that His Lordship is to be taken to have agreed, that on the processes that were placed before the ordinary bench, a genuine question for interpretation of article 94(2)(a) of the Constitution had arisen in the proceedings pending in the Court of Appeal. Clearly, His Lordship made his analysis refusing to stay the proceedings and make the referral on that basis and we are bound by that factual premise. What is more, that was the inexorable finding that any judicial mind could make from the processes in the election petition that had been exhibited before the ordinary bench. The reliefs claimed in the petition, the arguments of the parties and the ruling of the High Court all showed that the real issue in contention between the parties was the meaning and effect of article 94(2)(a) of the Constitution. What that means is that the first part of clause 2 of article 130 of the Constitution, as far as Kulendi, JSC was concerned, had been satisfied by the applicant, but what remained was whether or not to stay the proceedings and make the referral. But, it seems that if our brother had taken a closer read of the words used in the provision, the answer to the question whether or not to make a referral in circumstances where a judge makes a

finding that a real question of interpretation of the constitution had arisen in proceedings in a court other than the Supreme Court would have been obvious to him. The provision is as follows;

(2) ***Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court*** *shall* ***stay the proceedings and refer the question of law involved to the Supreme Court for determination;*** **and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.** (Emphasis supplied).

The words used by the framers of the Constitution are, **"SHALL STAY THE PROCEEDINGS AND REFER..."**. The provision is mandatory and does not afford a judge a discretion whether to make a referral or not. Once a court finds that an issue or question relating to interpretation or enforcement of the Constitution has arisen in proceedings outside the Supreme Court, the referral is concomitant. Equally, where the Supreme Court makes a finding that an issue relating to interpretation or enforcement of the Constitution has arisen in proceedings in a lower court, the Supreme Court must make a referral to itself. Consequently, in **Republic v High Court, Accra; Ex parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party)[2007-2008] SCGLR 213, Republic v High Court (Commercial Division), Accra; Ex parte Attorney-General (Balkan Energy Ghana Ltd & Ors-Interested Parties) [2011] 2 SCGLR 1183** and **Republic v High Court (General Jurisdiction), Accra; Ex parte Zanetor Rawlings (Ashittey & National Democratic Congress-Interested Parties)(No.1) [2015-2016] 1 SCGLR 53,** the Supreme Court stayed the proceedings in the lower courts and made referrals to itself the moment they found that, on the proceedings in the lower court, a genuine question for constitutional interpretation had arisen. The position adopted by the court has been that it is the Constitution itself that has dictated that a stay and referral to the Supreme Court shall be made of all questions of constitutional interpretation and enforcement. That is the plain effect of the words used in clause 2 of article 130 and

they follow logically from clause 1 of the article which confers **exclusive jurisdiction** on the Supreme Court to interpret and enforce the Constitution.

It appears that His Lordship Kulendi, JSC inadvertently misapprehended what was said by Ocran, JSC in **Republic v High Court, Accra; Ex parte Electoral Commission (Mettle-Nunoo & Ors-Interested Parties) [2005-2006] SCGLR 514** about discretion as to the ***timing*** **to make a referral** by a lower court judge to whom an application has been made for stay of proceedings in a case and for a referral of an issue for constitutional interpretation or enforcement pursuant to clause 2 of article 130. The discretion was explained to exists only in respect of the **timing or stage** of the proceedings for ordering a stay and referral but once the judge makes a finding that an issue of interpretation or enforcement of the Constitution has arisen, there is no discretion whether to stay the proceedings and make the referral or not. Time is allowed for the judge to whom an application is made to ascertain that the facts before her actually give rise to a genuine issue of interpretation or enforcement of the Constitution. Professor Ocran JSC, in **Republic v High Court, Accra; Ex parte Electoral Commission (Mettle-Nunoo & Ors-Interested Parties)(supra)** at page 555 of the report explained himself as follows;

"While article 130(2) does not use the phrase "immediate" referral, it does state that when an issue of interpretation arises in any proceedings the court concerned ***MUST*** *make a referral to the Supreme Court. To the extent that the* ***TIMING would be determined by the nature of the case or the issue, and when it is raised, one cannot lay down a hard and fast rule. In that sense, the judge might be said to have some discretion in the matter."*** (Emphasis supplied).

In **Republic v High Court (Commercial Division), Accra; Ex parte Attorney-General (Balkan Energy Ghana Ltd & Ors-Interested Parties) [2011] 2 SCGLR 1183** at p 1190 Sophia Akuffo, JSC (as she then was) stated the mandatory nature of the requirement for a stay and referral when she said as follows;

"Clearly, the parties were in disagreement as to whether, within the meaning of Article 181(5), the agreement was an "international business or economic

transaction", and therefore should have been first laid before Parliament for its approval. In other words, the scope of a provision of the 1992 Constitution had come into contention and that necessitated further interpretation of article 181(5), to settle once and for all the question raised for determination. In such circumstances, the best course of action ***(indeed the only lawful course of action)****, for the learned High Court Judge, was to refer the issue to the Supreme Court in compliance with Article 130(2),* ***to avoid the usurpation of this Court's exclusive interpretative jurisdiction."*** (Emphasis supplied).

Therefore, even in relation to a judge of a lower court, once she has made a finding that a genuine question for interpretation of the Constitution has arisen in proceedings before her, she must stay the proceedings and make a referral and no discretion arises. Hence, as our learned brother had found, on hearing the application for self referral, that a genuine question of interpretation had arisen in the proceedings in the election petition before the Court of Appeal, he had no discretion whether to stay the proceedings and to make a referral or not. Accordingly, his refusal to stay the proceedings in the Court of Appeal and make a referral was a fundamental error in violation of the clear provisions of article 130(2) of the Constitution.

Even that discretionary time within which the lower court may need to convince itself that a real interpretative question arises has been urged to be made very brief. See, **Republic v High Court; Ex parte Electoral Commission (Mettle-Nunoo & Ors-Interested Parties)(supra), Republic v High Court, Accra; Ex parte Commission for Human Rights and Administrative Justice (Richard Anane Interested Party)(supra), Republic v High Court (Commercial Division), Accra; Ex parte Attorney-General (Balkan Energy Ghana Ltd Interested Party)(supra)** and **Nii Kpobi Tettey Tsuru III v Attorney-General [2010] SCGLR 904.** The applicant has referred to the speech of Dotse, JSC in **Nii Kpobi Tettey Tsuru III v Attorney-General (supra)** at pp 951 to 952, where the learned Justice reviewed the earlier decisions of the Supreme Court on the dictated approach to the question of when to make a referral and said as follows;

"For example, if as in the instant case, from an ordinary reading and appreciation of the plaintiffs claims, it was clear that the taking of evidence was not at all necessary, and the determination of the issues might dispose of the suit one way or the other, the taking of evidence for whatever reason would amount to an ***improper exercise of discretion and usurpation of the jurisdiction of the Supreme Court in a reckless manner.***

This is because, a cursory glance at the core relief claimed by the plaintiff herein, to wit,

"a declaration that under clauses 5 and 6 of article 20 of the Constitution 1992, the land compulsorily acquired under a certificate of title dated 9th August, 1957 had ceased to be used as a wireless station for which it was acquired"

should have been apparent to the learned trial judge that this was a case which called for constitutional interpretation, pure and simple. ***In that regard therefore, the High Court did not have jurisdiction and the court ought to have promptly stayed proceedings and made the referral to the Supreme Court to enable the trial court get guidance from the Supreme Court for the determination of the case before it in line with the decision of the Supreme Court, referred to supra in the Ex-parte Electoral Commission case."****(*Emphasis supplied).

Therefore, if our brother had properly considered the words used in clause 2 of article 130 and these binding precedents discussed supra, his approach to his duty as dictated by the Constitution would have been different and he would have had to stay the proceedings in the Court of Appeal and made the referral promptly. By failing to stay the proceedings in the Court of Appeal despite finding that a real question of interpretation of article 94(2)(a) had arisen before that court, was risking that court undermining article 130(1) of the Constitution and usurping the exclusive jurisdiction of the Supreme Court.

Whereas our respected brother inadvertently failed to follow the mandatory language of clause 2 of article 130 of the Constitution, he rather engaged in an exercise of choosing between interpretation of article 94(2)(a) to be undertaken by

the Supreme Court by the route of the writ of summons that had been filed by the interested party and the referral applied for under article 130(2) of the Constitution as if the two procedures would have served the same purpose in the Constitution. However, if His Lordship had considered closely the final phrase of clause 2 of article 130, to wit; **"and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court"**, it would have dawned on him that the purpose of the referral jurisdiction of the Supreme Court conferred by clause 2 of article 130 and regulated under Part VII (Rule 67) of C.I.16, is considerably different from the original jurisdiction of the court conferred by article 2(1) and clause 1 of article 130, regulated under Part IV (Rules 45 to 53) of C. I. 16. The two jurisdictions work to different ends and are regulated separately in C.I.16. A referral under clause 2 of article 130 stays the proceedings and would result in the interpretation by the Supreme Court being directed to the court in which the question arose, for it to determine the case in accordance with the decision of the Supreme Court. A writ invoking the original jurisdiction of the court on the other hand does not end with a resolution of a pending case.

The context in which the application for referral was made to the ordinary bench was that before the Court of Appeal there were proceedings in an appeal concerning the validity of the declaration of the applicant as the dully elected Member of Parliament for Assin North constituency. Since the High Court had already given a judgment in the matter, it is only the Court of Appeal that can pronounce on the validity of that parliamentary election. The writ in the Supreme Court, even if it were prosecuted, can only lawfully result in an interpretation of article 94(2)(a) of the Constitution but it would not end with a declaration that the election of the applicant was valid or not valid.

Unfortunately, the learned judge inadvertently mixed up the two jurisdictions as if they were the same and alternatives for the same purpose. The refusal to stay the proceedings in the Court of Appeal despite the mandatory terms of article 130(2) meant that the Court of Appeal was free to determine the case before them as they deem fit and irrespective of the writ filed in the Supreme Court. The learned judge described the writ as the "more convenient and procedurally proper (sic) context" in

this case than staying proceedings and making a referral. But how can the procedure that left the Court of Appeal free to interpret article 94(2)(a) and come to their own conclusion on its meaning and effect, just as the High Court judge did, be more convenient in this case? We find it difficult to understand how resorting to the procedure which has been specifically provided for by the Constitution itself for situations where an issue for interpretation of the Constitution is pending before a court other than the Supreme Court can be described as abuse of process whereas it is agreed that a genuine issue for constitutional interpretation is pending in a lower court. In our view, even if the two procedures were available as alternatives, which they are not, the one which makes it possible for a lower court to usurp the exclusive jurisdiction of the Supreme Court and to possibly contradict the Supreme Court on a point of law can never qualify as more proper or convenient than the procedure specifically provided for by the Constitution for the dispute in issue. The procedure of stay and referral would ensure that both the lower court and the Supreme Court uphold the same meaning and effect of the constitutional provision in dispute.

Consequently, if our respected brother had taken note of the separate purposes and the difference between the original and reference jurisdictions of the Supreme Court in coming to his decision, he most likely would not have considered the two jurisdictions as the same or the writ as being the more proper procedure in the context of this case. With due regard to our celebrated brother, his reasoning failed to take into account the substantial difference between the heads of jurisdiction of the Supreme Court provided for under clause 1 of article 130 and clause 2 of the article and which are regulated by Part IV and Part VII of C.I.16 respectively. These are enactments binding on him and on the authorities on Supreme Court review, the failure to uphold them makes his decision reviewable.

Our learned brother also said that allowing interpretation by the writ that had only been filed and refusing to stay proceedings and make the referral to the Supreme Court would save time. However, it must now be clear to the majority of the ordinary bench that between proceedings that had crystallized and a referral was found justified, if the court made the referral to itself, the hearing would commence

almost immediately pursuant to Rule 67(3). That was the surest route to saving time in having the provision interpreted by the Supreme Court than waiting for a writ that had not been responded to, the processes under Rules 47 to 53 of C.I.16 had not been gone through for a joint memorandum of issues to be filed, adopted by the court, before submissions could be filed and a date set for hearing. In the circumstances of this case, if saving time were the consideration, then the choice of the path of the writ was in plain error and that would have needed to be corrected by a review of the decision of the majority of the ordinary bench to avoid setting a wrong precedent in this court.

On her part, the reasons assigned by our honourable sister Torkornoo, JSC for refusing to stay the proceedings in the election petition in the Court of Appeal and making a referral was that she did not find that there was proof before the ordinary bench that a real question for interpretation of article 94(2)(a) of the Constitution had arisen in the proceedings in the Court of Appeal. She delivered herself as follows;

"My view is that what constitutes sole allegiance to Ghana is a matter that must take critical nascence from a firm position taken by the Applicant which contradicts that taken by the Interested Party before the court, or that assumed by the trial judge, from the Judgement in issue. There must be a position on the proper import of Article 94 (2) (a) and a background case properly stated which allows this Court to set down for determination the required evaluation for interpretation and enforcement of the relevant constitutional, in this case Article 94 (2) (a). *Without these positions, derived from either the record from the courts below, or the question as couched by the person or court referring the issue to this court,* it is indeed *inappropriate* to submit that a reference for interpretation and enforcement of Article 94 (2) (a) arose out of the proceedings before the Court of Appeal that is the record before us." (Emphasis supplied).

Our sister then referred to subrules (1) and (2) of Rule 67 of C.I.16 and took the view that those provisions ought to have been complied with to enable the court to

undertake an interpretation or enforcement of the Constitution. Rule 67(1) of C.I.16 is as follows;

67 (1) A reference to the Court for the determination of any question, cause or matter pursuant to any provision of the Constitution or of any other law shall be by way of a case stated by the court below, or by the person or authority making the reference.

Rule 67(2) then sets out the details of the contents of a statement of case. But the application that was before the ordinary bench was not being made under Rule 67(1). From her position, our sister inadvertently failed to consider the application to the ordinary bench as one invoking the Supreme Court's power of self referral. This is a power the Supreme Court has exercised in the cases that were referred to in the statements of case of the parties and its exercise has been outside of Rule 67(1) and (2). In **Republic v High Court, Accra; Ex parte Commission for Human Rights and Administrative Justice (Richard Anane Interested Party)(supra)** at 237 of the report, the Supreme Court by itself formulated and set down the issue for interpretation arising on the processes that were exhibited before them in the affidavit in support of the application for certiorari. Again, in **Republic v High Court (General Jurisdiction), Accra; Ex parte Zanetor Rawlings (Ashittey & National Democratic Congress-Interested Parties) (supra)** at p 68 of the report, the question for interpretation was formulated by the Supreme Court and referred to itself. The court has previously exercised this power of framing the issue for referral itself without waiting for a lower court to do so under Rule 67(1) and (2) of C.I.16. So, our respected sister erred when she said it was inappropriate to apply for a referral in the absence of compliance with subrules 1 and 2 of Rule 67. She simply abdicated from a jurisdiction she plainly had.

As the applicant points out, when the Supreme Court is called upon, or it decides *suo moto*, to make a self referral, it has always acted on the affidavit evidence placed before them in deciding whether a real question of interpretation had arisen in the proceedings in the lower court or not. In this case, all of that information was provided to the ordinary bench in the affidavit in support of the application and its exhibits which I made references to in my dissenting opinion in the judgment of the

ordinary bench. The reliefs claimed in the election petition, the statement of claim, the provisions of the Constitution relied upon by the petitioner, his legal arguments proffering an interpretation of article 94(2) (a) and the contrary interpretation placed by the applicant on the constitutional provision, the interpretation by the High Court judge of the constitutional provision; all were stated in the exhibits to the affidavit in support of the application. If our sister implied that she did not read and take into account that affidavit evidence provided by the applicant, then it means that she did not accord him a fair hearing before coming to judgment on his application. But a decision made by a judge without hearing fairly a party who availed himself to be heard, is void and ought not to be allowed to stand.

In **Republic v High Court, Accra; Ex parte Commission for Human Rights and Administrative Justice (Richard Anane Interested Party)(supra)** Wood, CJ stated that a reading of the contentions of the parties in the High Court were sufficient to disclose that a real issue of interpretation of the Constitution arose in the case in the High Court. Dotse, JSC in his speech in **Nii Kpobi Tetteh Tsuru III v Attorney-General (supra)** quoted above, said a reading of the first relief claimed by the plaintiff alone was sufficient to deduce that the case raised a question for interpretation and enforcement of the Constitution. There was more than sufficient material before the ordinary bench for a decision to be made whether or not a genuine question of interpretation had arisen in the proceedings before the Court of Appeal and the ordinary bench was under obligation to read and apply that information.

In the preoccupation of our sister Torkornoo, JSC with the need for a statement of case from the lower court to be presented to the Supreme Court in the form set out in subrules 1 and 2 of Rule 67 of C.I.16, she failed to read subrules 3 and 4 of the same Rule which enable the Supreme Court itself to make orders to similar effect as would be contained in a statement of case if upon a self referral, it requires arguments from the parties or information from the record in the lower court. The provisions are as follows;

(3) Each party may, with the consent of the court below or that person or authority, and shall, when so ordered by the Court, state his case or jointly

state a case containing arguments of law and a list of the decided cases and the statute law in support of the case.

(4) The Court may call for the record of the proceedings before the court below or before the person or authority making the reference.

Consequently, our sister's engrossment about a case stated by a lower court to the Supreme Court to facilitate interpretation or enforcement of the Constitution by the court was completely misplaced and caused by an inadvertent failure to read the whole of Rule 67. The errors pointed out above in the approach of our sister to the application before the ordinary bench are basic and fundamental as they arise out of a failure to take into account statutory provisions as well as judicial precedents that bind her by virtue of article 129(3) of the Constitution.

The result of all of the above basic and fundamental errors by the majority of the ordinary bench was that the applicant, who was plainly entitled to have the constitutional provisions concerning him referred for interpretation by the Supreme Court and the proceedings in the election petition against him in the Court of Appeal stayed, has been denied justice by the majority decision. That is a clear miscarriage of justice that ought to be remedied by a reversal of the majority decision of 9th March, 2022. We accordingly grant the application for review, order a stay of the proceedings in the case in the Court of Appeal and make a referral of article 94(2)(a) of the Constitution, 1992 to the Supreme Court for interpretation. Following the interpretation, the Court of Appeal shall determine the case in accordance with the interpretation rendered by the Supreme Court.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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